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In The

Supreme Court of the United States

October Term, 1984

ALPHA BETA COMPANY, CAROLE COLE AND LYNNE COPPIN,

Petitioners,

vs.

RITA NAHM,

Respondent.

On Petition for Writ of Certiorari to California Court of Appeal for the First Appellate District

BRIEF IN OPPOSITION

GWILLIAM & IVARY
STEVEN R. CAVALLI
Counsel of Record
436 - 14th Street, #616
Oakland, CA 94612
Telephone: (415) 832-5411

Counsel for Respondent Rita Nahm

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QUESTIONS PRESENTED

1. Is a state tort claim for intentional infliction of emotional distress preempted by federal labor law where adjudication of the claim does not require interpretation or examination of a collective bargaining agreement, and where the matters complained of are deeply rooted in local feeling and merely of peripheral concern to the federal labor law?

2. Where a state tort claim for intentional infliction of emotional distress is not preempted by federal labor law, is the claimant required to exhaust administrative remedies provided by the collective bargaining agreement?

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STATEMENT OF THE CASE

The California Supreme Court has properly permitted an employee to maintain an action for intentional infliction of emotional distress against an employer who engages in a concerted course of conduct designed to harass, humilitate and upset the employee, correctly holding that the particular state tort claim alleged by Respondent Rita Nahm (hereafter "Rita Nahm") is not barred by the federal preemption doctrine as stated in *San Diego Unions v. Garmon* (1969) 359 U.S. 236 and qualified in *Farmer v. Carpenters* (1977) 430 U.S. 290.

This case is the factual equivalent of *Farmer,* one in which the gravamen of the Complaint is not only the acts complained of, but the particularly abusive and seemingly vindictive manner in which they were carried out.

Both *Farmer* and, now, this case, preserve important rights of employees throughout the nation and, more importantly, hold employers accountable in damages for the manner of outrageous conduct complained of, the regulation of which remains of great local importance to the States. Employers are presently not allowed to use collective bargaining agreements as shields to protect against egregious conduct directed against their employees. A reversal of the decision upheld by the California Supreme Court, and a consequent departure from the principles set forth in *Farmer* and other cases[1], would signal employers across the nation that they may act with virtual impunity under circumstances similar to those alleged by Rita Nahm.

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[1] See, also, *Linn v. Plant Guard Workers* (1966), 383 U.S. 53; *Automobile Workers v. Russell* (1958), 356 U.S. 634; and *Machinists v. Gonzalez* (1958), 356 U.S. 617.

A. The Facts

Rita Nahm became an employee of Petitioner Alpha Beta when she was hired as a clerk to work in the bakery of one of Petitioner's supermarkets in May of 1980. She was a member of the Retail Clerks Union which had entered into a collective bargaining agreement with Petitioner on behalf of its employees. During the last six months of her employment with Petitioner, from approximately September of 1981 through February of 1982, two of her superiors subjected her to a number of episodes and encounters which were designed to harass, humiliate and upset her. This campaign culminated with a trumped up written warning for alleged insubordination on February 27, 1982. Rita Nahm became so severely distraught as a result of this six month campaign against her that she never returned to work.

In her Complaint Rita Nahm alleges several specific instances of abusive conduct, including (1) the making of rude and humiliating comments by her superiors about her in front of customers and co-employees; (2) a decrease in the number of her working hours below those of other employees with less or the same seniority; (3) degrading her job performance in front of others; (4) causing her to perform the job duties of others; (5) asking her to work overtime and then verbally abusing and chastising her for doing so; (6) making false statements in documents in her personnel file to make it look as if she had been insubordinate; (7) discriminating against her in favor of other employees; (8) using foul and abusive language toward her; and then (9) refusing her request for a transfer to another store. (Appendix "1".)

Rita Nahm would be willing to concede that, without more, an isolated complaint involving seniority and working hours, or causing one to perform another's job duties, or discrimination, or a refusal of a request for transfer would require submission to the grievance machinery provided in the collective bargaining agreement. However, not surprisingly, there is nothing in the collective bargaining agreement which touches on the abuse, degradation or chastisement of which she complains. Moreover, with regard to all the allegations, it is the particularly abusive manner in which this concerted course of conduct over a six month period was carried out which forms the heart of her complaint. It is contended that these numerous "episodes and encounters [were] designed to harass, humiliate and upset" her. (App. 3.)

From the outset of this case, Petitioner has attempted to distort the clear allegations of Rita Nahm's Complaint and to transform it from a properly pled intentional tort into a breach of contract action. This effort was rejected by the California Supreme Court and should be rejected here.

B. Proceedings Below

Rita Nahm takes exception to the statement set forth at page 5 of Petitioner's brief which suggests that its motion for summary judgment was denied by the trial court "without comment". The trial court was of the opinion that *Farmer* was controlling and that a cause of action for intentional infliction of emotional distress was properly pled.

The Court of Appeal agreed, stating that Petitioner's "contentions impermissibly distort Nahm's complaint

which, in our view, plainly alleges a course of conduct intentionally undertaken for the purpose of inflicting emotional distress upon Nahm. . . . This is not a situation in which (as in cases on which defendants rely) a plaintiff has by 'artful pleading' undertaken to disguise an alleged wrongful discharge or other direct violation of a collective bargaining agreement in tort rhetoric. This is a legitimate tort complaint." (See Petitioner's App. 12-13.)

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REASONS FOR DENYING THE WRIT

A. Preemption Is Not Mandated In Matters Where Adjudication Of A State Tort Claim Does Not Require Interpretation Or Examination Of A Collective Bargaining Agreement, And Where The Matters Complained Of Are Deeply Rooted In Local Feeling And Merely Of Peripheral Concern To The Federal Labor Law.

In the evolution of the preemption doctrine as it applies to federal labor law, this Court has acknowledged, on the one hand, the preemptive power conferred by Congress upon the National Labor Relations Board with regard to enforcement and interpretation of the Labor Management Relations Act, *San Diego Bldg. Trades Council v. Garmon* (1959) 359 U.S. 236, 242, and, on the other hand, the fact that Congress did not intend to preempt "all local regulation that touches or concerns in any way the complex interrelationships between employees, employers and unions." *Motor Coach Employees v. Lockridge* (1971) 403 U.S. 274, 289. More recently, in *Allis-Chalmers v. Lueck* (1985) — U.S. —, the Court stated:

> "Nor do we hold that every state-law suit asserting a right that relates in some way to a provision in a collective bargaining agreement, or more generally to the parties to such an agreement, necessarily is preempted by §301. The full scope of the pre-emptive effect of federal labor-contract law remains to be fleshed out on a case by case basis."

Thus, it has been held that certain activity is not preempted by federal labor law where such activity was "merely a peripheral concern of the Labor Management Relations Act . . . or touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *Farmer v. Carpenters* (1977) 430 U.S. 290, 296-297. In addition, there is no preemption unless resolution of a state-law claim is "substantially dependent" upon analysis of the terms of an agreement made between the parties to a labor contract. *Allis-Chalmers Corp. v. Lueck, supra,* — U.S. —.

The analysis set forth in *Farmer* is directly on point and dispositive. In that case, which also originated in California, a state tort claim for intentional infliction of emotional distress was held not to be preempted upon allegations that Farmer's decedent, Hill, had been subjected to a campaign of personal abuse and harassment and had been discriminated against in referrals from the hiring hall. In holding that there was no preemption, it was noted that there is no provision of the NLRA which protects the outrageous conduct which is an essential element of the tort of intentional infliction of emotional distress under California law. *Farmer v. Carpenters, supra,* at p. 302. While acknowledging that there might be

some risk that the state cause of action for intentional infliction of emotional distress would touch on an area of federal concern (*Ibid.*, p. 303), the legitimate and substantial interest of the State in protecting its citizens from such conduct outweighed any such risk (*Ibid.*, p. 304) and the state tort action could be resolved without resolution of the merits of any underlying labor dispute. (*Id.*)

> "On balance, we cannot conclude that Congress intended to oust state-court jurisdiction over actions for tortious activity such as that alleged in this case. . . . Simply stated, it is essential that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened. . . ." (*Ibid.*, p. 305.)

Not only does Rita Nahm allege a course of conduct which is not addressed by the collective bargaining agreement, but she complains of the particularly abusive manner in which this six month campaign of harassment, humiliation and abuse was carried out. If anything, the conduct alleged in *Farmer,* and upon which the Court found no preemption, was of a lesser degree than that which Rita Nahm had to endure. And, as in *Farmer,* surely this Court cannot conclude that Congress intended to oust the California court of jurisdiction over an action for the type of tortious activity such as that alleged in this case.

Contrary to the clear parallels between this case and *Farmer,* Petitioners suggest that several recent federal court opinions should control here. Petitioners conveniently ignore the fact that the state tort claim set forth by Rita Nahm does not depend, for its adjudication, upon resort to the collective bargaining agreement.

Regardless, all of the opinions cited by Petitioners are distinguishable from this case. It should be noted that the California Court of Appeal examined each of these cases and determined that they were not applicable to this case.

Olguin v. Inspiration Consolidated Copper Co. (9th Cir. 1984) 740 F.2d 1468 involved a situation where the employee was specifically disciplined on four separate occasions and ultimately discharged, and he filed a grievance on each occasion, acknowledging that each incident arose out of the collective bargaining agreement. The Court held that all of the alleged incidents were clearly grievable disputes as opposed to the type of conduct alleged in *Farmer*.

Moore v. General Motors Corp. (8th Cir. 1984) 739 F.2d 311 involved a transfer which was specifically covered by the collective bargaining agreement. The Eighth Circuit specifically acknowledged that this was not the type of conduct which *Farmer* and *Russell* held to be exempt from preemption.

> "Unlike the conduct complained of in *Russell* (threats of violence), *Linn* (malicious libel), and *Farmer* (intentional infliction of emotional distress), Moore's complaint does not involve violent or outrageous conduct. . . ." (at p. 316.)

Viestenz v. Fleming Companies, Inc. (10th Cir.) cert. den. — U.S. —, 103 S.Ct. 303 (1982) involved a wrongful discharge claim which was held to be outside of the "*Farmer* exception to the *Garmon* preemption rule."

> "The conduct must be sufficiently 'outrageous', and the harm suffered by Mr. Viestenz must have resulted from the manner in which he was interviewed or dis-

charged, rather than from the fact of the discharge itself." (at p. 703.)

Both *Beers v. Southern Pacific Transportation Co.* (9th Cir. 1983) 703 F.2d 425 and *Magnuson v. Burlington Northern, Inc.* (9th Cir. 1978) 576 F.2d 1367, cert. den. 439 U.S. 630 involved cases relating to the Railway Labor Act (45 U.S.C. §§151 et seq.). Each of these cases involved what were classified as "minor disputes" and, therefore, mandatorily subject to the express arbitration provisions mandated by that Act. As the California Court of Appeal pointed out:

> ". . . the RLA has made *any* grievance arising out of the collective bargaining agreement subject to the exclusive arbitral remedies contained in that Act . . . It follows from this difference that a state claim is more likely to impinge on an area of exclusive administrative jurisdiction under the RLA than under the NLRA." (Petitioners' App. 6-7, citing *Jackson v. Consolidated Rail Corp.* (7th Cir. 1983) 717 F.2d 1045, 1052; cf. also *Andrews v. Louisville & Nashville R. Co.* (1972) 406 U.S. 320, 323.)

Moreover, both *Magnuson* and *Beers* involved claims of wrongful discharge which clearly involved grievances within the purview of the LRA, as opposed to the instant case which does not require interpretation and examination of the collective bargaining agreement in order to adjudicate the state tort claim.

In sum, *Farmer* is controlling as it applies to the claims alleged by Rita Nahm. The conduct which she was forced to endure is substantially more egregious than that which Farmer's decedent, Hill, was subjected to and which this Court has held to be not preempted by the federal labor law.

B. Since There Is No Preemption, Rita Nahm Was Not Required To Exhaust The Remedies Provided By The Grievance Provisions Of The Collective Bargaining Agreement.

The California Court of Appeal acknowledged the strong federal policy in favor of arbitrating labor disputes under existing collective bargaining agreements, and noted that California law was in accord. (Petitioners' App. 11-12.) Notwithstanding that acknowledgement, the California Court recognized that Petitioners were merely attempting to distort a "legitimate tort complaint" into a breach of contract (collective bargaining agreement) action, an effort which the Court rejected.

This Court recently expressed a strong policy toward preserving "the central role of arbitration in our system of industrial self-government" in cases involving "disputes traditionally resolved through arbitration." *Allis-Chalmers Corp. v. Lueck* (1985) — U.S. —. That case clearly involved a dispute which arose directly from the collective bargaining agreement, unlike the instant case wherein Rita Nahm complains not of a violation of the collective bargaining agreement, but of a much more abusive and vindictive course of conduct, extended over a six month period, which no employee should have been required to tolerate. Petitioners would suggest that Rita Nahm should have run to her union representative to file a grievance for each act which she has complained of during the six month period. Under circumstances such as these, there should be no such requirement under the federal labor scheme. Rather, where the circumstances clearly show an intent to inflict emotional distress, *Farmer* should be upheld and affirmed.

CONCLUSION

The decision of the California Supreme Court is in complete accordance with the law announced by this Court in *Farmer, Linn,* and *Russell.* There is no apparent reason under the circumstances of this case for a departure from these decisions. For all of the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

GWILLIAM & IVARY
STEVEN R. CAVALLI
Counsel of Record
436 - 14th Street, #616
Oakland, CA 94612
Telephone: (415) 832-5411

Counsel for Respondent
Rita Nahl

APPENDIX "1"

STEVEN R. CAVALLI
GWILLIAM & IVARY
436 - 14th St., Ste. #616
Oakland, CA 94612
(415) 832-5411

Attorneys for Plaintiff

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA
HAYWARD DISTRICT

NO. H-85473-9

RITA NAHM,

Plaintiff,

-vs-

ALPHA BETA, INC., a corporation; CAROL COLE; LYNN COPPIN; and DOES 1 through 100,

Defendants.

COMPLAINT FOR DAMAGES
(Intentional Infliction of Emotional Distress)

COMES NOW, plaintiff RITA NAHM, and complains of defendants above named, and each of them, and for a cause of action alleges:

1. That the true names and capacities of the defendants sued herein as DOES 1 through 100 are unknown to plaintiff who therefore sues such defendants by such fictitious names. Plaintiff is informed and believes and so alleges that each defendant is negligently responsible in some manner for the events referred to and alleges that each DOE defendant is also responsible for breach of contract and in strict liability and for breach of warranties

which caused damages proximately thereby to plaintiff and prays leave to amend this, her complaint, to include the exact names and capacities of said defendants when the same can be ascertained together with the appropriate charging allegations.

2. Plaintiff is informed and believes, and thereon alleges that, at all times herein mentioned, defendant ALPHA BETA, INC., was a corporation authorized to do and doing business in the State of California and the County of Alameda.

3. At all times herein mentioned, defendants CAROL COLE and LYNN COPPIN were managerial level employees of defendant ALPHA BETA, INC. and were superiors of plaintiff.

4. Plaintiff is informed and believes and thereon alleges that, at all times herein mentioned, each defendant, including the fictitiously named defendants, was the agent, servant or employee of each remaining defendant, and was at all such times acting within the scope and purpose of such agency and that each act of each defendant was authorized and ratified by each remaining defendant.

5. Commencing in May of 1980, plaintiff was employed by defendant ALPHA BETA, INC. in the bakery department of the Alpha Beta store located at 1791 De Coto Road, in the City of Union City, County of Alameda, State of California. At all times herein mentioned, defendant CAROL COLE was the assistant store manager of the above mentioned Alpha Beta store. At all times herein mentioned, defendant LYNN COPPIN was the manager of the bakery of the above mentioned Alpha Beta

store. Commencing in approximately September of 1981, defendants above named and each of them, participated in episodes and encounters designed to harass, humiliate and upset plaintiff by, among other things, making rude and humiliating comments to and about plaintiff in front of customers and co-employees; decreasing her number of working hours below those of other employees who had less or the same seniority as plaintiff; degrading her job performance in front of others; causing plaintiff to perform the job duties of others; asking plaintiff to stay on and work overtime and then verbally abusing and chastizing her for doing so; making false statements in documents in plaintiff's personnel file to make it look as if plaintiff was being insubordinate to superiors; discriminating against plaintiff in favor of other employees; using foul and abusive language directed at plaintiff; refusing to honor plaintiff's request to be transferred to another store.

6. The aforesaid outrageous conduct of defendants, and each of them, was done intentionally and maliciously for the purpose of causing plaintiff severe emotional distress or with a conscious and reckless disregard of the likelihood that such conduct would cause plaintiff to suffer severe emotional distress.

7. As a direct and proximate result of said outrageous conduct by defendants, and each of them, plaintiff has suffered severe emotional distress, humiliation and mental anguish all to her general damage in a sum within the jurisdictional purview of this court.

8. As a further direct and proximate result of the above alleged conduct of the defendants above named,

and each of them, plaintiff was required to and did employ physicians and surgeons to examine, treat and care for her and did incur medical and incidental expenses, the exact amount of which is unknown to plaintiff at this time. Plaintiff is informed and believes that she will require further medical care in the future as a result of her severe emotional distress, humiliation and mental anguish and asks leave of court to amend her pleading to set forth the exact amount thereof when the same can be ascertained.

9. That as a further direct and proximate result of the above alleged conduct of the defendants above named, and each of them, plaintiff will lose and may continue to lose in the future, loss of earnings and earning capacity by reason of her severe emotional distress, humiliation and mental anguish; that the full amount and nature of said loss of earnings and earning capacity cannot be ascertained at the present time and plaintiff prays leave to amend this, her complaint, to include the amount of said loss of earnings and earning capacity when the same can be ascertained.

10. The aforesaid acts and conduct of defendants, and each of them, were done oppressively, maliciously and with a conscious disregard of plaintiff's rights and mental health and plaintiff therefore prays that punitive damages be assessed against each of the defendants in a sum appropriate to punish and set an example.

11. As a direct and proximate result of the conduct of the defendants, and each of them, as herein alleged, plaintiff is now or may hereafter be entitled to interest as provided by law.

WHEREFORE, plaintiff RITA NAHM prays for judgment against the defendants herein and each of them, as follows:

1. For general damages in a sum within the jurisdictional purview of this court;

2. For medical and incidental costs, according to proof;

3. For loss of earnings and earning capacity, according to proof;

4. For punitive damages, according to proof;

5. For costs of suit herein incurred; and,

5. For interest as is provided or as may hereafter be provided by law;

6. For such other and further relief as the court may deem just and proper.

GWILLIAM & IVARY
By /s/ Steven R. Cavalli